IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

J. D. OSBORN, *Plaintiff in Error,*
v.
CHARLES ALTSCHUL,
Defendant in Error.
} No. 465.

In Error to the Circuit Court of the United States for the District of Oregon.

Brief for Defendant in Error.

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STATEMENT OF THE CASE.

This is an action of ejectment instituted in the United States Circuit Court for the District of Oregon by Charles Altschul, the defendant in error, against J. D. Osborn, the plaintiff in error, to recover the north half of section one, in township nineteen south, range forty-three east of the Willamette meridian, situate in Malheur county, Oregon.

The Circuit Court rendered a judgment adjudging that said Altschul was the owner in fee simple and entitled to the immediate possession of the property in question, and

that execution issue to dispossess said Osborn and to restore Altschul to the possession thereof; and further adjudging that said Altschul recover his costs and disbursements from Osborn, and that execution issue therefor. This appeal was thereupon taken by Osborn.

The complaint contains the appropriate jurisdictional allegations regarding the citizenship and residence of the parties, and the value of the land in question, and further alleges that said Altschul is the owner in fee simple and entitled to the immediate possession of the property; that Osborn, without any right of title, has entered and is upon said land and wrongfully withholds the possession thereof from Altschul, to his damage, in the sum of $3,500.00; and prays judgment for the restitution of said premises, for the sum of $3,500.00 damages, and for costs and disbursements. (Transcript of Record, p. 5.)

Osborn in his amended answer traverses the allegations of the complaint, with the exception of those relating to the citizenship and residence of the parties, and also denies that he is, or ever has been, upon any of the land in question except the east half of the northwest quarter, and the south half of the northeast quarter of said section one; and, as a further and separate defense, he alleges that, on the —— day of October, 1870, he became, by purchase, the owner of said east half of the northwest quarter, and the south half of the northeast quarter of said section one; and is, and has been for more than ten years immediately prior to the commencement of this action, the owner in fee and in the possession thereof; also that he and his grantors and predecessors in interest have been in the adverse possession of said land last above described under claim of

ownership and color of title at all times since said —— day of October, 1870. (Transcript of Record, p. 15.)

Altschul, in his reply (Transcript of Record, p. 17), puts in issue the allegations of the defendant's answer.

At the trial, Altschul and Osborn offered testimony to support the issues made by them respectively. Altschul, however, offered no testimony in support of his claim for damages, but such claim was expressly waived and abandoned by him at the trial. (Transcript of Record, p. 1.)

The jury before whom the cause was tried returned the following verdict, omitting the title of the court and cause:

"We, the duly impaneled jury in the above-entitled action, find a verdict for the plaintiff.

"C. V. KUYKENDALL, Foreman."

(Transcript of Record, p. 22.)

Thereafter, the defendant Osborn filed a motion in arrest of judgment and to set aside the verdict and for a new trial, upon the following grounds:

1. The verdict of the jury in the above-entitled cause is uncertain, irregular, insufficient, and does not determine the issues in the case.

2. Insufficient evidence to justify the verdict. (Transcript of Record, p. 23.)

The plaintiff Altschul also moved the court for an order nunc pro tunc to amend the verdict to conform to the issues made by the pleadings, the evidence, and the manifest intention of the jury, so that it should read as follows:

"We, the jury in the above-entitled cause, find that the plaintiff is the owner in fee simple and entitled to the immediate possession of the following-described land, situate in the County of Malheur and State of Oregon, to wit:

The north half of section one, in township nineteen, south of range forty-three, east of the Willamette meridian." (Transcript of Record, p. 26.)

Thereafter, on a hearing, the court denied the motion of said defendant Osborn for a new trial (Transcript of Record, p. 29), and granted the motion of the plaintiff Altschul to amend the verdict (Transcript of Record, p. 28), and thereafter, and upon such verdict as amended, entered the judgment from which this appeal is taken. (Transcript of Record, p. 30.)

The errors assigned by the defendant Osborn upon this appeal are:

1. That the Circuit Court erred in allowing plaintiff's motion to amend said verdict, and in not denying the same.

2. In denying plaintiff's motion for arrest of judgment and for a new trial, and in not granting the same.

3. In rendering judgment in favor of the plaintiff Altschul and against the defendant Osborn upon the verdict as amended, and in entering any judgment at all in favor of the plaintiff and against the defendant. (Transcript of Record, p. 41.)

These assignments of error present but one question for consideration; that is, whether the court had the power to amend the verdict of the jury. For Altschul, the defendant in error, we contend that the amendment was proper, and that the judgment of the Circuit Court must be sustained.

Osborn, the plaintiff in error, on pages 5 and 11 of his brief, for the first time presents another ground of error, viz., that the court erred in sustaining the demurrer of Altschul to the second separate answer and defense set

forth in his original answer. We will dispose of this question before considering the question raised by the assignments of error.

ARGUMENT.

I.

Altschul's demurrer was properly sustained: but if not, the error of the circuit court cannot be considered upon this appeal.

Defendant Osborn filed an answer, which is found on pages 7 to 11 of the Transcript of Record. It contains, besides the denials, two further and separate defenses. To the second separate defense plaintiff demurred, upon the ground that it did not state facts sufficient to constitute a defense. (Transcript of Record, p. 12.) This demurrer was sustained, with leave to Osborn to file an amended answer. (Transcript of Record, p. 10.) Osborn then filed an amended answer (Transcript of Record, pp. 14 to 16) which omits the second separate defense. To this answer plaintiff did not demur, but replied; and the trial was had upon the complaint, amended answer and reply.

The error, if any, of the Circuit Court in sustaining Altschul's demurrer, cannot be considered upon this appeal.

1. Because Osborn has not assigned such ruling of the court as error. Under rules 11 and 24 of the United States Circuit Court of Appeals for the Ninth Circuit, errors not included in the assignment of error will be disregarded. These rules also provide that the court may, at its option, notice a "plain error" not so assigned; but this provision has no application to this case; for, as we understand it, a "plain error" means an error that is manifest—clear beyond question—and which does not admit of

argument. If the point is open to discussion, it is not "plain."

2. The filing of the amended answer was a waiver of any error committed by the court in sustaining the demurrer to the original answer. The amended answer, which is an entirely new pleading, became a substitute for the original answer, and is to be considered as if it were the only answer interposed in the case. All motions and demurrers relating to the original answer cease to be a part of the record.

In the case of Wells v. Applegate, 12 Oregon, 208, defendant filed a second amended answer, denying the material allegations of the complaint and setting up as new matter several counter-claims. Part of the new matter was stricken out on motion, and a demurrer to the remainder was sustained. A third amended answer was filed by the defendant, containing only denials of the allegations of the complaint. On the trial, judgment went for the plaintiff. On appeal, the errors chiefly relied upon were the rulings of the court in sustaining the motion and demurrer to the second amended answer. The Supreme Court, however, held that these errors were waived by pleading over; that by filing the amended answer the former answer was in effect withdrawn, and all motions and demurrers relating to it accompanied it.

But even granting that the ruling of the court in sustaining Altschul's demurrer can be considered upon this appeal, we nevertheless submit that no error was committed.

The second separate defense to the original answer (Transcript of Record, pp. 9 and 10), the demurrer to which was sustained, was as follows:

"That during all the times herein mentioned, defendant "and his predecessors in interest were, and now are, citi- "zens of the United States, qualified to enter and hold "public lands under the land laws of the United States.

"That at all times since the —— day of October, 1870, "the E. ½ of the N. W. ¼, and S. ½ of the N. E. ¼ of section "one (1), township nineteen (19) south, range forty-three "(43) east of the Willamette meridian, being a portion of "the lands described in plaintiff's complaint, have been, "and still are, occupied by bona fide settlers, who were "qualified during all of said times to enter and to hold "public lands under the homestead and pre-emption laws "of the United States; and said bona fide settlers, during "all of said time, occupied said land in good faith, and "fully intended to enter the same under the laws of the "United States.

"That on the —— day of ———, 1890, the defendant, "who was at that time and at all times herein mentioned "a citizen of the United States, and qualified to enter and "to hold public land under the land laws of the United "States, attempted to file a homestead on said premises "last above described, by sending the proper homestead "application to the local land office, but that said appli- "cation was rejected by the land department, and is still "rejected and denied, for the reason that said lands had "been already patented to the defendant's grantor, the "Willamette Valley & Cascade Mountain Wagon Road "Company, on the 30th day of October, 1882.

"That said lands are within the limits of the grant, "made by act of Congress of July 5, 1866, to the State of "Oregon, for the benefit of the Willamette Valley and

"Cascade Mountain Wagon Road Company, being an act "entitled 'An act granting lands to the State of Oregon, "to aid in the construction of a military road from Albany, "Oregon, to the eastern boundary of said state.'

"That during all the times herein mentioned, said lands "were free and unappropriated lands of the United States, "except by said bona fide settlers above referred to as "occupying the same.

"That said settlement by said bona fide settlers and application to file thereon excepted the said lands from "the operation of the said grant to the said Willamette "Valley & Cascade Mountain Wagon Road Company.

"That, acting upon the belief that the said company "would not select nor claim said premises at any time, "defendant and his predecessors in interest made valu- "able improvements on said premises to the amount of "$1,250.00.

"That said improvements were made prior to the selec- "tion and patenting of the said land to the said company."

Then follows the prayer that Osborn be adjudged the owner of the property in fee; that it be adjudged that Altschul holds the patent for the lands in trust for Osborn; etc.

This separate defense shows that the legal title had passed by patent from the government long before Osborn presented his homestead application. To Altschul's legal rights, based upon the patent, Osborn does not interpose a *legal* defense in the portion of the answer demurred to, but pleads a supposed equity which he claims entitles him to have it decreed that Altschul holds the patent in trust for him. This equity does not proceed upon any privity

between him and Altschul or the company, but upon an alleged improper ruling of the land department in issuing the patent to the Wagon Road Company. This defense is not maintainable in this action.

1. Because it is a well-settled principle of law that in actions of ejectment the legal title must prevail. Oregon is one of the states where the distinction between law and equity is still observed.

Beacannon v. Liebe, 11 Oregon, 443, 446.

Burrage v. B. G. & Q. M. Co., 12 Oregon, 169, 172.

It is held in this state that an equitable title is no defense to an action of ejectment.

Stark v. Starr, 1 Sawyer, 15.

Newby v. Rowland, 11 Oregon, 133, 135.

2. Because such defense is a collateral attack upon the patent. In this case the patent came into consideration as one of the links in Altschul's chain of title. It is being called into question collaterally. This cannot be done. It can only be assailed in a direct proceeding. The patent is conclusive in an action at law as to the legal title.

The point is well illustrated by the case of Lee v. Kingsbury, 62 Am. Dec. 546, where the proceeding was trespass to try the title to land. Plaintiff claimed under a certain decree of foreclosure. Defendants, in their answer, endeavored to attack the decree as illegal and void. The court held that such attack was collateral.

Hooper v. Scheimer, 23 Howard, 236, was an action of ejectment. The defendant claimed under a patent. The plaintiff objected to the introduction of the patent, on the ground that it was inoperative and void, and had been issued without authority of law and for lands not subject

to patent. The objection was overruled. The plaintiff claimed under an entry made in the United States land office, which under the laws of Arkansas entitled him to maintain an action of ejectment. The court, on page 249, said:

"This court held, in the case of Bagnell et al. v. Brod-
"erick (13 Peters, 450), 'that congress had the sole power
"to declare the dignity and effect of a patent issuing from
"the United States; that a patent carries the fee, and is
"the best title known to a court of law.' Such is the set-
"tled doctrine of this court.

"But there is another question, standing in advance of
"the foregoing, to wit: Can an action of ejectment be
"maintained in the federal courts against a defendant in
"possession, on an entry made with the register and
"receiver?

"It is also the settled doctrine of this court that no
"action of ejectment will lie on such an equitable title,
"notwithstanding a state legislature may have provided
"otherwise by statute. The law is only binding on the
"state courts, and has no force in the circuit courts of
"the Union. Fenn v. Holme (21 How. 482)."

In Steel v. St. Louis Smelting & Refining Co., 1 Sup. Ct. Rep. 389, an action of ejectment was brought to recover possession of certain real estate. The defendant pleaded that the patent under which plaintiff claimed was void; that fraud, bribery, perjury, subornation of perjury were used to obtain it; that the lands which the patent embraced were part of a townsite, and were thus reserved from sale by the laws of congress; that the land included in the townsite was neither mineral nor agricultural, the

patent in question being for mineral lands. On pages 393 and 394 the court observes:

"It is among the elementary principles of the law that "in actions of ejectment the legal title must prevail. The "patent of the United States passes that title. Whoever "holds it must recover against those who have only unre- "alized hopes to obtain it, or claims which it is the exclusive "province of a court of equity to enforce. However great "these may be, they constitute no defense in an action at "law based upon the patent. That instrument must first "be got out of the way or its enforcement enjoined, before "others having mere equitable rights can gain or hold "possession of the lands it covers. This is so well estab- "lished, so completely imbedded in the law of ejectment, "that no one ought to be misled by any argument to the "contrary."

On page 394 the court continues: "Where ejectment is "founded upon either of these instruments, the patent of "the government or the deed of the individual, the ques- "tion being which of the parties has the legal title, it is "irrelevant to introduce evidence to show that one of "them ought to have had it, and might be able to get it "by a proceeding in some other tribunal, or in some other "form of action."

And, again, on page 395, it is said: "So with a patent "for land of the United States, which is the result of the "judgment upon the right of the patentee by that depart- "ment of the government to which the alienation of the "public lands is confided, the remedy of the aggrieved "party must be sought by him in a court of equity, if he "possesses such an equitable right to the premises as

"would give him the title if the patent were out of the "way. If he occupy, with respect to the land, no such "position as this, he can only apply to the officers of the "government to take measures in its name to vacate the "patent or limit its operation. It cannot be vacated or "limited in proceedings where it comes *collaterally* in "question. It cannot be vacated or limited by the offi- "cers themselves; their power over the land is ended "when the patent is issued and placed on the records of "the department. This can be accomplished only by reg- "ular judicial proceedings, taken in the name of the gov- "ernment for that special purpose."

In Smelting Co. v. Kemp, 104 U. S. 640, it is said:

"The execution and record of the patent are the final "acts of the officers of the government for the transfer of "its title, and as they can be lawfully performed only after "certain steps have been taken, that instrument, duly "signed, countersigned and sealed, not merely operates "to pass the title, but is in the nature of an official declara- "tion by that branch of the government to which the "alienation of the public lands, under the law, is intrusted, "that all the requirements preliminary to its issue have "been complied with. *The presumptions thus attending "it are not open to rebuttal in an action at law.*"

Again, on page 645, the court quotes from Johnson v. Towsley, 13 Wall. 721, as follows: "'That the action of "the land office,' the court added, 'in issuing a patent for "any of the public land, subject to sale by pre-emption or "otherwise, is conclusive of the legal title, must be admit- "ted on the principle above stated, and in all courts and "in all forms of judicial proceedings where this title must

"control, either by reason of the limited powers of the "court or the essential character of the proceeding, no "inquiry can be permitted into the circumstances under "which it was obtained.'"

And, again, on page 647: "If in issuing a patent its "officers (i. e. of the land office) took mistaken views of "the law, or drew erroneous conclusions from the evi- "dence, or acted from imperfect views of their duty, or "even from corrupt motives, a court of law can afford no "remedy to a party alleging that he is thereby aggrieved."

See also French v. Fyan, 93 U. S. 171; Cahn v. Barnes, 7 Sawyer, 54.

3. Because such separate defense does not show that the patent was not properly issued to the Wagon Road Company.

The defense sets forth that the act of congress was of date *July 5, 1866;* that since *October, 1870,* the land was occupied by bona fide settlers; that patent issued to the Wagon Road Company in *1882;* that Osborn presented his application for homestead in *1890;* and that the land in question is within the limits of the grant.

It is a rule of construction that a pleading is always to be taken most strongly against the pleader.

The act of congress of July 5, 1866, above referred to (14 U. S. St., p. 89) is a grant in praesenti.

The United States v. W. V. & C. M. W. R. Co., 42 Fed. Rep. 357.

Cahn v. Barnes, 7 Sawyer, 53, and cases cited.

The language of the act is: "That there be, and hereby is granted to the State of Oregon," etc.

In the same cases it is held that as soon as the line of the road was designated, the grant attached to the odd-numbered sections, within the prescribed limits, on either side of the line, and took effect from the date thereof.

It makes no difference whether the grant takes effect on particular lands from the time of the designation of the line of the road or from the date of selection; for, as it does not appear from the answer that there were settlers upon the land prior to 1870, or in what year the line of road was designated, or in what year the selections were made, or whether at either of such times there were settlers upon the land, inasmuch as patent has issued it must be conclusively presumed that all steps requisite to earn the land in question were duly taken.

The purpose of the defense is to show that the lands were excepted from the grant by reason of occupation by settlers. Even if this question of fact could be inquired into in this case, still, as the answer does not show that the lands were occupied between 1866 and 1870, it must, if necessary, be assumed that the right of the Wagon Road Company accrued to this particular land during that period.

We repeat the language of the court in Smelting Co. v. Kemp, 104 U. S., pp. 640 and 641, already quoted:

"That instrument (the patent), duly signed, counter-
"signed and sealed, not merely operates to pass the title,
"but is in the nature of an official declaration by that
"branch of the government to which the alienation of the
"public lands under the law is intrusted that all the
"requirements preliminary to its issue have been com-
"plied with. The presumptions thus attending it are not
"open to rebuttal in a court of law."

The presumption must be that the patent was rightfully issued; and, so far as legal title is concerned, the patent is conclusive. Had the answer set up any sort of an equitable title, which it does not, it would be immaterial. And had it set up any error or fraud in the issuance of the patent, which it does not, such allegations, in this action, would be immaterial. In short, these allegations amount to nothing.

II.

It was the duty of the court to amend the verdict to conform to the law. The intent of the jury is plain.

This attempt to take up the time of the court by a new trial, subjecting the plaintiff to all the expense, and giving to the defendant another chance in the lottery of a jury trial, simply because the jury at the trial already had did not write up its verdict in technical phraseology, is an illustration of why it is that the common people so often speak disparagingly of the law, and generally believe it to be more technical than just. Nobody has the slightest doubt as to what the jury meant by its verdict. Counsel for the defendant certainly has none; and yet he hopes to have another chance in court by invoking a technicality which, as he seeks to apply it in this case, disregards plain common sense.

This point needs no extended argument. The law and the facts are substantially as follows:

Hill's Annotated Laws of Oregon, Section 320, provides:

"The jury, by their verdict, shall find as follows: 1. If "the verdict be for the plaintiff, that he is entitled to the "possession of the property described in the complaint, or "some part thereof, or some undivided share or interest

"in either, and the nature and duration of his estate in "such property, part thereof, or undivided share or inter- "est in either, as the case may be. 2. If the verdict be "for the defendant, that the plaintiff is not entitled to the "possession of the property described in the complaint, "or to such part thereof as the defendant defends for, and "the estate in such property or part thereof, or license or "right to the possession of either established on the trial "by the defendant, if any; in effect as the same is required "to be pleaded."

Section 318 provides: "The plaintiff in his complaint "shall set forth the nature of his estate in the property, "whether it be in fee, for life, or for a term of years, and "for whose life, or the duration of such term, and that he "is entitled to the possession thereof, and that the defend- "ant wrongfully withholds the same from him to his "damage such sum as may be therein claimed. The prop- "erty shall be described with such certainty as to enable "the possession thereof to be delivered if a recovery be "had."

Section 329 provides: "In an action to recover the pos "session of real property, the judgment therein shall be "conclusive as to the estate in such property and the right "to the possession thereof, so far as the same is thereby "determined, upon the party against whom the same is "given, and against all persons claiming from, through, or "under such party, after the commencement of such ac- "tion, except as in this section provided."

Sections 318 and 329 indicate that an action of eject- ment in this state is not merely a possessory action, but that it involves necessarily the determination of the title

to the disputed tract; and that unless the complaint sets forth the nature of the plaintiff's estate and tenders an issue as to title, the action cannot be regarded as in ejectment.

In Thompson v. Wolf, 6 Oregon, 308, the complaint failed to state the nature of the estate of plaintiff, but sought only the recovery of the possession of the land. On page 311 the court said:

"It cannot be regarded as an action of ejectment. In "that action it is necessary that the plaintiff set forth the "nature of his estate in the property, whether it be in fee, "for life, or for a term of years (Civil Code, Section 315), "thereby enabling the courts to settle the question of "title, which is the great end of the action of ejectment "with us. . . . Therefore we are of opinion that this "must be regarded as an action brought under the forcible "entry and detainer act. (Misc. Laws, Chapter 23.) ". . . To be sufficient in ejectment, it (the complaint) "would have to tender an issue as to title, and would "thereby be insufficient in forcible entry and detainer, be-"cause the statute expressly forbids inquiry into questions "of title in such actions. (Misc. Laws, Chapter 23, Sec-"tion 16.) It is sufficient in forcible entry and detainer, "and consequently is insufficient in ejectment; for in that "action, as has already been said, an issue must be ten-"dered as to title. (Civil Code, Section 315.)"

The complaint in this case tenders these issues (Record, p. 5): That the plaintiff is the owner in fee simple and entitled to immediate possession; and that the defendant, without any right of title, has entered upon the land, and withholds the possession thereof, to the damage of plain-

tiff in the sum of $3,500. The second issue was abandoned at the trial, and never went to the jury in any form. (Stipulation, printed Record, p. 1.) Therefore, the jury had before them the single issue, properly pleaded as for an action in ejectment, that the plaintiff was the owner in fee simple and entitled to immediate possession of the land. When they found a verdict for the plaintiff, no one can doubt that it meant that they had found that the plaintiff was such owner and entitled to such possession. In contemplation of law and as an actual, practical fact, the jury had before them the single question, Was the plaintiff the owner in fee and entitled to the immediate possession of the land described in the complaint? And (the same question, differently stated), Had the possession of the defendant been such as to deprive the plaintiff of his title and his right to immediate possession? Under these circumstances, and this being all that was before the jury, a verdict for the plaintiff can by no possible twisting be supposed to mean anything else than that the title and right of possession are adjudged to the plaintiff; in short, that the plaintiff is the owner in fee simple and entitled to immediate possession of the property described in the complaint. Every issue made, whether by the complaint or by the answer, centers in the question, Has the plaintiff such an estate that he is entitled to the immediate possession of the land? And when the jury answer in the plaintiff's favor on this point, all propositions of law involved are answered.

The intention of the jury being clear, it is elementary that the court can mould the verdict into proper legal form. It is true, the laws of Oregon require that the ver-

dict in an action in ejectment shall find that the plaintiff is entitled to the possession of the land, and shall state the nature and duration of the plaintiff's estate. But in determining that the court has only put the verdict into form, it is proper to remember that originally the common law verdict in an action of ejectment was simply the word "Guilty." Afterwards, it was a verdict *for the plaintiff;* and if there were damages, they were especially assessed and designated. The verdict here rendered was in effect, then, a common law verdict. There can be no more doubt as to the meaning and intention of the verdict than there was as to the thousands of such verdicts that have been rendered at common law. This being so, the court merely took the common law verdict and put it into statutory form.

The law is that the Federal courts, in actions at law, are to be governed as to procedure, as nearly as may be, by the laws of the states in which the courts are held; but it is also held that the statutes of a state and the decisions of the state courts have no effect upon the Federal courts as to the manner in which the records of such courts shall be kept. As the verdict is the court's own record, made by the court itself, or by its clerk, it would seem that the Federal courts have the right to enter up in common law form, even in such a state as Oregon, the verdict of a jury in an ejectment case. It is true that in the case of Pensacola Ice Co. v. Perry, cited by the plaintiff in error, a judgment resting on a verdict for the plaintiff was reversed where the law of the state required that the verdict should state the quantity of the estate; but this was done on an admission by the plaintiff that his judgment

was fatally defective, and apparently without discussion of any kind before the court or by the court. There was, of course, no question as to an amendment, and the case is not in point.

So far as we can discover, the precise question as to whether a state statute relative to the proper wording of verdicts is absolutely mandatory on the Federal courts has never been expressly passed upon by the United States Supreme Court. But in Railroad Co. v. Horst, 93 U. S. 291, and in Nudd v. Barrows, 91 U. S. 426, the court expressly says that the personal conduct and administration of the judge in the discharge of his functions is neither practice, pleading, nor form of procedure, and that such a statute was not intended to fetter the judge in the personal discharge of his accustomed duties.

In U. S. Mutual Accident Association v. Barry, 131 U. S. 100, the court decides that where the statute of a state makes it mandatory on the jury to return special verdicts when asked for, a refusal to put such special verdicts to the jury is not error.

In Mexican Central Railway Co. v. Pinckney, 149 U. S. 194; Campbell v. Haverhill, 155 U. S. 610, and Goldey v. Morning News, 156 U. S. 518, the court holds that conformation to the state procedure is only to be *as near as may be*, leaving to the Federal courts a large discretion. And in Lowry v. Story, 31 Fed. Rep. 769, the court states that it will reject any subordinate provisions of a state statute that tend to defeat the ends of justice.

In St. Louis, etc., Railway Co. v. Vickers, 122 U. S. 360, the court holds that a state constitution cannot affect the

common law right of a Federal judge as to the charging of juries, any more than a state statute can.

The utmost restriction upon the court, in such matters, that can be deduced from reason and authority, would seem to be this: That while perhaps the verdict ought to be *entered up* in the form required by the state statute (though even this is by no means certain, in our view), yet the common law right of the judge to take the verdict from the jury and clothe it in proper form—to change their language and to mould his record as his discretion suggests, and in accordance with the pleadings and the evidence—cannot be questioned.

The Oregon decisions do not controvert this view, but support it. In D. M. Osborne & Co. v. Morris, 21 Oregon, 367, the court expressly states that the common law right to amend a verdict after the jury is discharged is not abrogated by Sections 211 and 212 of Hill's Code.

The common law rule was that, when necessary to the ends of justice, the verdict might be amended, even in matters of substance, before the trial court; but that when the amendment was upon a matter of mere form, the verdict might be amended and put into proper shape before the trial judge alone, before the court *in banc*, or even in the *appellate court;* and the practice was to allow these amendments from the judge's notes or from his recollection of the evidence at the trial, or upon affidavit of the jurors, or any other evidence satisfactory to the court. It was said that allowing these amendments was not impeaching a verdict, but establishing it and putting it into better form.

In Matheson's Administrators v. Grant's Administrators, 2 How. 263, Justice Story says (p. 281): "There is "no time absolutely fixed within which such an amend- "ment should be moved. All that the court requires is "that it should be done within a reasonable time. . . . "When a general verdict is given for the plaintiff, such "applications, when made within a reasonable time, are "usually granted, and the verdict allowed to be amended "so as to be entered on the good counts. . . . This "is most usually done upon the judge's notes of the evi- "dence at the trial. . . . But it may be done upon any "other evidence equally satisfactory. . . . The prac- "tice is a most salutary one, and is in furtherance of jus- "tice and to prevent the manifest mischiefs from mere "slips of counsel at the trial, having nothing to do with "the real merits of the case." He then cites a few of the principal English authorities, saying in conclusion (p. 284: "*The question of the amendment was a question of "discretion in the court below upon its own review of the "facts in evidence; and we know of no right or authority "in this court upon a writ of error to examine such a ques- "tion, or the conclusion to which the court below arrived "upon a survey of the facts, which seem to us to have be- "longed appropriately and exclusively to that court.*"

The English authorities establish that all matters of amendment of the record were in the discretion of the court, and only gross abuse of the discretion was reviewable.

Mellish v. Richardson, 7 B. & C. 832, holds that the entry of a verdict which is not the proper one, according

to the issues and the evidence, is the *misprision of the clerk*, and so subject to correction.

In Mayo v. Archer, 1 Strange, 514, a special verdict was amended to accord with the evidence, as shown upon affidavit and by notes of the judges.

In Dalrymple v. Williams, 63 N. Y. 362, the subject of the power of a court over its own record, and the right to amend a verdict, and the difference between setting a verdict in proper form and impeaching a verdict, are well discussed by Allen, J. Among other things, he says that it would be a reproach upon the administration of justice if a party could lose the benefit of a trial and a verdict in his favor by the mere mistake of the foreman of a jury in reporting to the court the result of the deliberations of himself and his fellows. He says: "The amendment is "in the nature of an attempt to correct a clerical mis- "take"; and that the matter rests in the discretion of the judge.

The Supreme Court of New Jersey, in Phillips v. Kent, 23 N. J. L. 158, says: "The court in which the verdict is "found may give form to a general verdict so as to make "it harmonize with the issues. If a verdict be not *for- "mally expressed* in the words of the issue, *yet if the "point in issue can be collected from the finding of the "jury, the court will work it into form and make it serve.*" The case was one of trespass, a possessory action involving title; and the court further says: "The verdict in "this case necessarily settles both issues. There is no "difficulty in ascertaining what the jury must have in- "tended. If they had found title in the defendants, or if "they had found no demise, their verdict must have been

"for the defendants. A verdict of '*guilty*' necessarily "*rests upon finding both issues in the affirmative.*"

In Humphreys v. Mayor, etc., 48 N. J. Law, 595, an action in ejectment, the verdict was rewritten by the court, so as to make it accord with the proper statutory form, the court saying (p. 596): "The verdict was not changed "in substance, but only put in proper form."

It seems to us that we have now stated and made out our case fully; i. e., that where the issues and the evidence are clear and the verdict can have but one meaning and one application—where the intention of the jury is manifest—it is within the power of the court to mould the verdict into proper form. The improper framing of a verdict is a misprision of the clerk; it is the court's own error, in theory of law.

The right of a court to mould a verdict into proper form is so well established that adverse counsel really make no contention against it, their claim being that this amendment was something more than a mere correction of language. But judgment of the intention of the jury must be left to the trial court, with its notes before it; and its discretion is not reviewable here.

In addition to the authorities from which we have quoted, we cite the following:

Koon v. Insurance Co., 104 U. S 106.

Perkins v. Wilson, 3 Cal. 137.

Doe v. Perkins, 3 Term Reports, star page 749.

Burlingame v. Central Railway Co., 13 Fed. Rep. 706.

Stewart v. Boynton, 31 N. J. L. 17.

Clark v. Lamb, 8 Pick. (Mass.) 414.

Cogan v. Ebden, 1 Burrow, 383.

3 Blackst. Comm., star page 407.

In the following cases the verdict was allowed to be amended in this way: When the jury has brought in a verdict allowing damages in excess of the amount claimed in the complaint, a remittitur of the excess by the plaintiff was taken as a correction of the verdict, and judgment was entered for the proper amount.

Usher v. Dansey, 4 Maule & Selwyn, 94.

Pickwood v. Wright, 4 H. Bla. 642.

Hardy v. Cathcart, 1 Marsh. 180.

So that, in the case at bar, if the question of damages had not been expressly taken from the jury, by waiver of the plaintiff, a remittitur by the plaintiff would have enabled the court to enter the proper verdict.

The paper verdict is not a part of the record.

Kaufman v. Strain, 43 Pac. Rep. 395.

Under the common law, and (it would seem from the foregoing authorities) the modern practice also, the verdict handed in by the foreman is a mere paper memorandum, and becomes no part of the record until entered up in the court's journal, equivalent to the parchment roll of the old practice.

In the brief submitted by counsel for the plaintiff in error, we find no case, in either United States or state court, that seems to us directly in point; no case where the issues and the verdict of the jury made the intention plain —where the application for amendment of the verdict was made while it was still in paper and the proceedings were still fresh in the mind of the court—where the court, exercising its discretion, amended the verdict—and where such amendment was held by the appellate court to have been error.

As to whether the intention of the jury is plain or not, discussion would not lend much aid; and we can say nothing better, in conclusion, than the trial judge himself said in rendering his decision: "The right of the court, in its "discretion, to mould the verdict into form so that it will "conform to the intent of the jury being once conceded, "there remains no opportunity for discussion in this case, "as the intention of the jury is perfectly manifest to any "one."

Respectfully submitted.

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With them on the Brief.